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In the Supreme Court of the United States

October Term, 1940

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BRIGHAM YOUNG UNIVERSITY,
Petitioner and Appellant,

vs.

EDITH CANNON LILLYWHITE,
Respondent and Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TOPICAL INDEX

	Page
Petition for Writ of Certiorari	1
I. Summary of Statement of Matter Involved	1
II. Basis of Court's Jurisdiction	8
III. Questions Presented	9
IV. Reasons Relied Upon for Allowance of Writ	10
Brief in Support of Petition	12
I. Opinions of Court Below	12
II. Statement of Case	12
III. Argument	12
1. Admission of testimony of Instructor Harvey Howell and Dr. Elton Quinn	12
2. Instruction of the Court	15
3. Denial of Petitioner's Motion for Directed Verdict	17
4. University an Eleemosynary Non Profit Institution entitled to exemption from liability	27
IV. Conclusion	30

32527

AUTHORITIES CITED

Page

Bates v. San Pedro L. A. S. L. R. Co., 38 Utah, 568; 114 P. 527 26

Benjamin v. Nernberg, (Pa. 1931), 157 Atl. 10 26

Branchi v. South Park Presbyterian Church, et al, (N. J. 1939), 8 A. (2d) 567-571 26

Bullock v. Luke, 98 Utah 501; 98 P. (2d) 350 24-26

Busse v. Murray Meat & Livestock Co., (1915) 45 Utah 596, 147 P. 626 24

Capps v. Carpenter (Kan.) 283 P. 655 20

Carroll v. Central Counties Gas Co., 273 P. 875 15

Dingman v. Mattock Co., (Cal. 1939), 96 P. (2d) 821 26

Dolley v. Mid-Western Dairy Products Co., 80 Utah 331, 15 P. (2d) 309 26

Ettlinger v. Trustees of Randolph Macon College (C. C. A. 4th 1929) 31 F. (2d) 869 ..... 9, 30

Fee's Admrx. v. Mahan-Ellison Coal Corp. (Ky. 1931), 43 S. W. (2d) 681 24

Ford v. Coml. Motor Freight (Ohio) 14 N. E. (2d) 354-357 21

Gallenkamp v. Garvin Mach. Co. (N. Y.) 99 N. E. 718 20

Garthe v. Ruppert (N. Y.) 190 N. E. 643 14

Gulland v. Northern C. & D. C. (Wis.) 132 N. W. 755-56 21

Hamburger v. Cornell University (N. Y.) 148 N. E. 539, 42 A. L. R. 955-963 ..... 9, 23, 30

Henderson v. Twin Falls County, 56 Idaho 124, 50 P. (2d) 597; 101 A. L. R. 1151 29

Higgins v. Pratt Institute (C. C. A. 2d. 1930) 45 F. (2d) 698 ..... 9, 30

Hough v. Stone (Ohio 1925) 153 N. E. 313 15

Page

Knight v. Southern Pacific Co., 52 Utah 42, 172 P. 689..... 26

Lowe v. Lehman, 15 Ohio St. 179 16

McClellan v. Pa. R. Co. (2d C. C. A.) 62 F. (2d) 61..... 15

Moose v. Galigher Mach. Co., 51 Utah 504, 171 P. 153..... 26

National Pressure Cooker Co. v. Stroeter (7th C. C. A.) 50 F. (2d) 642, Certiorari denied 284 U. S. 674, 76 L. Ed. 570 15

O'Brien v. Alston, 61 Utah 368, 213 P. 791 26

Parks v. Northwestern University (Ill.) 75 N. E. 991.....9, 30

Philadelphia & R. Ry. Co. v. Thirouin (C. C. A. 3rd) 9 F. (2d) 856 19

Quinn v. Utah Gas & Coke Co. (1912) 42 Utah 113, 129 P. 362 24

Ruhlin, et al. v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290 8

Sessions v. Thomas Dee Memorial Hospital Ass'n., 89 Utah 222, 51 P. (2d) 229 8

Sessions v. Thomas Dee Memorial Hospital Ass'n., 94 Utah 460, 78 P. (2d) 645 8

Skelly Oil Co. v. Chambers (C. C. A. 10th) 87 F. (2d) 853.. 24

Steggell v. Salt Lake & U. R. Co., 50 Utah 139, 167 P. 237.... 24

Stocker v. Boston & M. R. R. (N. H.) 143 Atl. 68 15

Tremelling v. Southern Pac. (1917) 51 Utah 189, 170 P. 80 24

Watkins v. Piggly Wiggly Bird Co., (C. C. A. 8th) 31 F. (2d) 889 24

Wilcox v. Idaho Falls Hospital, 82 P. (2d) 849 29

F. W. Woolworth v. Davis (C. C. A. 10th), 41 F. (2d) 342.... 24

Statute:

Judicial Code, Sec. 240, Amended 28 U. S. C. A. Sec. 347 8

In the Supreme Court of the United States
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BRIGHAM YOUNG UNIVERSITY,
Petitioner and Appellant,
vs.
EDITH CANNON LILLYWHITE,
Respondent and Appellee.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Charles Evans Hughes, Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows to this court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

The petitioner BRIGHAM YOUNG UNIVERSITY is a non-profit corporation without capital stock, chartered to do business under and by virtue of the laws of the State of Utah with its principal place of business at Provo, Utah, where it conducts an educational institution of higher learning for the benefit of the members of the Church of Jesus Christ of Latter-day Saints in particular and for the public at large. Petitioner first began as an unincorporated college founded by President Brigham Young on or about the 16th day of October, 1875. He, at that time,

made a grant by deed of trust of property to petitioner's predecessor for its maintenance and operation. After his death and on or about the 18th day of July, 1896, the University was incorporated and the maintenance and operation thereof taken over by the Church of Jesus Christ of Latter-day Saints through said Corporation. The petitioner has been ever since said last named date maintained and operated by said Church, except that petitioner has received some donations and gifts from individuals and has charged matriculating students a tuition of $75.00 per year when the average operating cost per capita per year per student is $175.00. Since its incorporation the University has provided part tuition for widows' daughters in the sum of $30,030.00, and further during its annual Leadership Week has furnished free instruction and facilities to large numbers of Church members and the public not regularly matriculated at said University; the petitioner is on the approved list of the Association of American Universities and has had an average annual attendance for the period from 1929 to 1939 of 2300 students per year; the Church has over a period from July of 1896 to June of 1939, appropriated for the use and benefit of said institution the sum of $5,844,272.44 (R. 100-101).

Among the subjects taught by petitioner is the subject of chemistry, including both classroom and laboratory instruction (R. 90-91).

The respondent, Edith Cannon, at the age of 18 years, first registered for work at the University as a freshman in the fall of 1932. She had that spring graduated from the Davis County High School and at the time was living at Bountiful, Utah. She continued at the University except for time out because of the accident suffered by her in her chemistry laboratory work until the end of the school year of 1934. In August of that year she married Mr. Lillywhite, also a student at the University, and in the fall of the same year moved with him to Arizona where she has since resided (R. 41).

At the beginning of the Fall Quarter of 1932 she registered for and took Chemistry I, a lecture course conducted by Dr. Hugh W. Peterson, which was a course where the instructor taught the principles of chemistry and conducted experiments for the class to demonstrate the work, including the generating of and testing for oxygen, which experiment appellee in the spring quarter was engaged in performing at the time of the accident complained of in this case (R. 64-5).

In the Spring Quarter of 1933 she registered for Chemistry II, which was the laboratory course in question here. She began the course on March 20, 1933, under the direction of Instructor Alva J. Johansen, who had graduated from the University the year previous with a major in chemistry. There were thirteen in the class and the laboratory sessions were from 3:30 to 5:30 on Mondays, Wednesdays and Fridays (R. 72).

In beginning the course the students were assigned to what was known as the West Laboratory where they were met by Dr. Johansen (he having taken his doctor's degree in chemistry in the interim between the accident and the trial), who took up with them the Chemistry Manual they were to study and instructed them in the general technique of the work to be done in the course, the equipment to be used, the nature of the chemicals and compounds they were to use and the care required in proceeding with the work. They were told what chemicals and other substances were available to them in labeled bottles or containers on their desks, or arranged on shelves around the walls of the laboratory. Following the instructions given, the respondent with Miss Kay and Miss Rice, girls of about the same age and training, were assigned to desks adjoining each other and allowed to work out the exercises together. From the beginning of the course up to the 5th day of April, 1933—the day the accident occurred—the class and respondent had attended five laboratory periods and had come to Exercises 10 and 11 in the Manual, which had been previously assigned for work on that day (R. 72-4). Miss Cannon didn't remember going into the laboratory earlier than

the regular time on that day although Miss Kay and Dr. Johansen testified that they had commenced their work ahead of time to enable them to get through with their work sooner than usual.

The first experiment for that day was Exercise No. 10 (page 12 Chemistry Manual) (R. 121) providing for the preparation of oxygen by a variety of methods, mostly what is called test tube chemistry. Several metallic oxides, including manganese dioxide and lead peroxide and *potassium chlorate*, were used (R. 76-77). The text presenting this exercise contained a particular "caution" (R. 122) as to the use of potassium chlorate.

The oxygen was tested for in each experiment by inserting a glowing splint into the test tube after the contents thereof had been heated over a Bunsen gas burner, the use of which had been covered by Exercise No. 2 from the Manual (Exh. No. 2). Dr. Johansen had assisted the girls in the performance of this experiment No. 10 but, having an appointment, left the room with the instruction, he says, for the girls to get the equipment set up for Exercise No. 11 and await his return, but according to Miss Cannon to go right ahead with Exercise No. 11 (R. 15).

Regardless of what the instruction was the girls did go right ahead with Exercise No. 11 which is set out in the Manual. The objective of this experiment was "to learn several of the properties of oxygen." To accomplish this end it was necessary first to generate oxygen, catch it in bottles and then in the various ways prescribed in the lesson test for the oxygen (R. 15-16).

In preparing to perform the experiment a set of apparatus had to be set up (see drawing R. 16 post). After this had been done then two chemicals had to be mixed and placed in the test tube as appears in the drawing. The materials to be used according to the Manual were "manganese dioxide or ferric oxide, and potassium chlorate." To test for the oxygen the Manual provided that the student should secure "asbestos paper, combustion spoons, splints, sulfur, red phosphorus, iron picture wire, small candle."

Detailed directions as to each step to be taken by the student in doing the work were given as a part of the experiment (see Exercise R. 15).

The chemicals generally used to produce oxygen were manganese dioxide and potassium chlorate, or ferric oxide and potassium chlorate. In this laboratory manganese dioxide was the most commonly used, however, on this day the girls secured ferric oxide for use with the chlorate (R. 88-89).

In the regular class periods, and on this day, it was Dr. Johansen's procedure to help the students in his class and the three girls involved here, when and if they needed help, and after giving the help requested he would walk around through the laboratory helping other students or doing as he pleased. If one of the students or a group wanted him, he or they would call for Dr. Johansen to come and render the needed assistance (R. 37-48).

The girls here in going forward with Exercise No. 11 assembled the equipment and the various chemicals necessary for the experiment and set up the apparatus as pictured, mixed the supposed proper chemicals and proceeded with their attempt to generate oxygen by applying the Bunsen burner to the tube which contained the mixture—Dr. Johansen still being absent from the room. When the girls had supposedly made the mixture of potassium chlorate and ferric oxide and were about to apply the heat Miss Kay raised the question as to whether they should wait or go ahead (R. 39). She said:

> "One or both of the girls urged me to go ahead. I don't remember whether it was one or both. * * * They egged me on to do it and I did it and then there was the explosion."

The undisputed cause of the explosion was that the girls mixed the phosphorus, with which they were to test for the properties of oxygen, with the potassium chlorate and then applied

the gas burner. The mixture should have been the ferric oxide which they had secured from the stockroom and the potassium chlorate. Miss Cannon was working in a position between the other two girls. When the lighted burner was applied to the test tube containing the mixture the girls had compounded an explosion occurred which shattered the glass tube and other parts of the equipment, causing the injury to respondent complained of by her.

Respondent as a resident of the State of Arizona brought this case in the Federal District Court of Utah. In the trial of the case the attorney for respondent called as witnesses Instructor Harvey Howell, teacher of chemistry at the East Side High School of Salt Lake City, and Dr. Elton L. Quinn, instructor of chemistry at the University of Utah. The trial court, over the objection of petitioner, permitted these men to testify as to how each one of them conducted his department at his respective place of employment without regard to the fact that the conditions in neither institution compared in any way with that of petitioner (R. 51-52) (R. 59-62).

The court in submitting the case to the jury on this issue gave the following instruction:

> "THE COURT: I will reframe it, and say to the jury now, that the usual practice in other universities in respect to this or similar experiments in respect to supervision may be considered by you in determining whether or not Dr. Johansen exercised due and reasonable care in this particular instance. Such practice would not be conclusive, but it is a matter under all the circumstances of the case that you may take into consideration (Tr. 414)." (R. 8, 112).

The truth is, there was no evidence of custom or the usual practice in other Universities.

When the respective parties to the case had rested the petitioner moved the court for a directed verdict on the grounds:

First: That the plaintiff has failed to prove by any evidence the allegations of negligence set out in her complaint.

Second: That the plaintiff has failed to prove any negligence on the part of the defendant that proximately caused the accident resulting in the injury complained of by the plaintiff.

Third: That the plaintiff has established by the evidence that she assumed the risk and known dangers of the course in which she was engaged at the time of the accident.

Fourth: That plaintiff has established by her evidence the proximate cause of the injury was the action of herself and/or her friends, and not the action of the defendant.

Fifth: That the plaintiff has established affirmatively that she, with her two companions, were each guilty of negligence, which negligence proximately contributed to the plaintiff's injury.

Sixth: That the undisputed evidence shows that the defendant is a charitable and eleemosynary institution, and not liable in this case to the plaintiff for any injury suffered by her as a result of the accident complained of in her complaint (R. 101-102).

The court overruled the motion and then, reserving as a question of law the issue as to whether or not petitioner was exempt from liability as an eleemosynary institution, submitted the case to the jury. The jury, based upon answers to nine special interrogatories (R. 22-23), returned a verdict for respondent in the sum of $3500.00. Petitioner then moved for judgment notwithstanding the verdict (R. 23). This motion was based upon the grounds:

1. As set out in the motion for directed verdict. (See above).

2. That the judgment was not supported by the answers given to the special interrogatories (R. 22-23), because there was a conflict in the answers. For example, question 7 and answer: "Did the plaintiff or either of the

girls in proceeding with the experiment *negligently* make the mistake of mixing the wrong chemicals and did such mistake proximately cause the explosion? Answer: Yes."

3. That petitioner was exempt from liability as a non profit institution, engaged in an activity of great benefit to the public.

The court denied the motion and entered judgment against petitioner in the sum of $3500.00. Petitioner next, within time, filed its motion for a new trial (R. 28) which was submitted to and overruled by the court. Petitioner then appealed to the Circuit Court of Appeals of Tenth Circuit. The court affirmed the trial court. Petitioner requested a rehearing. This was denied, but Presiding Judge Phillips filed a dissenting opinion. (R. 137).

This petition is for a review of the decision of said Circuit Court of Appeals.

II

BASIS OF COURT'S JURISDICTION

1. The date of the judgment to be reviewed was January 17, 1941 (R. 135). The date of the order overruling petition for a rehearing was April 14, 1941 (R. 145).

2. The Circuit Court of Appeals of the Tenth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

Judicial Code, Sec. 240, amended, 28 U. S. C. A. Sec. 347;
Ruhlin, et al, v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290;
Sessions v. Thomas Dee Memorial Hospital Assn., 89 Utah 222, 51 P. (2d) 229;
Sessions v. Thomas Dee Memorial Hospital Assn., 94 Utah 460, 78 P. (2d) 645;

3. That this case presents a most important public question

for determination by this court because it is the first case in either State or Federal Courts to hold an University supported by endowment, or like funds, liable for alleged negligence under facts such as those involved in the instant case. State and Federal cases in conflict are:

Hamberger v. Cornell University (N. Y.), 148 N. E. 539, 42 A. L. R. 955;
Parks v. Northwestern University (Ill.), 75 N. E. 991;
Ettlinger v. Trustees of Randolph Macon College (C. C. A. 4th 1929) 31 F. (2d) 869;
Higgins v. Pratt Institute (C. C. A. 2d 1930) 45 F. (2d) 698.

III

QUESTIONS PRESENTED

1. The Circuit Court of Appeals erred in sustaining the admission by the trial court of the testimony of Instructor Harvey Howell (R. 49) and Dr. Elton Quinn (R. 59) on behalf of respondent relative to the conduct of their respective chemical laboratories in other institutions of learning (R. 2 to 5).

2. The Circuit Court of Appeals erred in sustaining the trial court in instructing the jury under the state of the record that it could consider "the usual practices in other universities." (R. 8-112)

3. The Circuit Court of Appeals erred in sustaining the trial court in denying petitioner's motion for directed verdict because:

(a) Respondent failed to prove the allegation of negligence set out in her complaint.

(b) Respondent failed to prove any negligence on the part of petitioner that proximately caused the accident.

(c) There was affirmative proof by respondent that she was guilty of negligence proximately contributing to the accident.

(d) Respondent assumed the risk of the ordinary and obvious dangers incident to the laboratory work undertaken by her.

(e) The petitioner University is a non-profit eleemosynary institution exempt from liability for the negligent acts of its servants.

4. The Circuit Court of Appeals erred in sustaining the trial court in the denial of petitioner's motion for judgment notwithstanding the verdict. The motion was based particularly upon point "(e)" under point "3" next above set out since the court had reserved that point as one of law, also upon the ground that the answers to the special interrogatories (R. 26) did not support the verdict (R. 24). The other points made in support of motion for directed verdict were resubmitted and included in the ruling of the court.

5. The Circuit Court of Appeals erred in sustaining the trial court in the denial of petitioner's motion for a new trial, which motion was based upon the following grounds: (R. 28)

(a) Irregularity in the proceedings of the court and jury by which the defendant was prevented from having a fair trial.

(b) Insufficiency of the evidence to justify the verdict, and that the verdict is against the law.

(c) Errors in law occurring at the trial, and excepted to by the defendant.

IV

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. That the trial and appellate courts have each committed a grevious mistake to the injury of petitioner in permitting this case to be submitted to the jury on evidence such as that of Instructor Howell and Dr. Quinn as to how each conducted his laboratory, as did the trial court in instructing the jury that it

could consider such evidence as going to prove an "usual and customary practice."

2. That the question of whether this petitioner as an educational institution shall be held liable for negligence under all of evidence introduced in this case is of great public interest and concern and rightfully deserves determination by this court.

3. That the majority opinion has decided a most important question of local law in a way that brings the decision in conflict with applicable local decisions.

4. That this court should determine and say whether or not under the law of Utah and the other state and federal cases in conflict with the decision in this case, the majority decision should be allowed to stand and establish the law in this most important public field.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 2167, BRIGHAM YOUNG UNIVERSITY, a corporation, Appellant, vs. EDITH CANNON LILLYWHITE, Appellee, and that the said judgment of the Circuit Court be reversed by this Honorable Court and remanded with directions that said case be by the trial court dismissed; and your petitioners will ever pray.

BRIGHAM YOUNG UNIVERSITY,

By ROBERT L. JUDD,
PAUL H. RAY,
S. J. QUINNEY,
Counsel for Petitioner.

A. H. NEBEKER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I
OPINIONS OF COURT BELOW

The prevailing and dissenting opinions of the Circuit Court of Appeals, the first dated January 17, 1941, and the second dated March 31, 1941, will be found (R. 125 and 137) and are reported in 118 F. (2d) 836.

II
STATEMENT OF CASE

This statement appears pages 1 to 8 of this petition and brief and will not be repeated.

III
ARGUMENT

1

The first point for discussion here is that it was error for the Circuit Court to sustain the trial court in admitting the testimony of Instructor Howell (R. 49) and Dr. Quinn (R. 59) on behalf of plaintiff to prove how petitioner should have conducted its chemical laboratory.

To permit the courts to relax the rule of evidence so as to give probative force to evidence of this kind leaves parties accused of negligence without the righteous protection accorded them under the reasoning of the courts throughout the years.

To exemplify the error complained of we herewith submit brief excerpts from the evidence of each witness.

Counsel for respondent submitted to Instructor Howell the following question:

"Q. Then Mr. Howell I will hand you that experiment No. 11 and ask you to outline to us the manner in which that experiment should in your opinion be carried out, including in your explanation as to how it should be carried out, the manner in which, if any, it should be supervised" (R. 50).

Objection was made to the question and some argument followed, during which the court said:

"I will let him answer the question within the limits I have designated, *how he has it* (the work) *done in his school*" (R. 51).

Over our further objection to all such evidence the court permitted the witness to give a description of his laboratory, the number of students he had in each class, their ages, and innumerable other facts which could not do other than confuse the jury and injure petitioner's cause (R. 53-7).

Dr. Quinn was asked the following question and over our objection was permitted to testify in part to the following facts, which we condense here to save time and space:

"Q. In explaining, in telling us how that experiment is performed and the supervision given, will you explain to us and tell us in what manner and under what circumstances that experiment is performed, and you might include in that the use of what equipment and the use of what chemical substances, and I might incidentally direct your attention to the equipment here that is upon the table and if it will help you in explaining that to refer to that equipment, you may do so."

"In this course we have 401 students divided into five sections. I have two or three assistants. They (the students) are not permitted to work in pairs. The student starts in with the first part, where it says the preparation of oxygen. He will mix his potassium chlorate with the manganese dioxide or the ferric chloride similar to this experiment, place it in the test tube and start heating it, collecting the oxygen in a bottle very similar to the one on exhibit here. This experiment takes approximately

three hours to complete it, for the average student. We circulate among the desks—around the desks, answer questions that they may ask, watch them to see that they set up the apparatus as directed, and see that they write their notes up when they finish the experiment" (R. 59-60).

Nowhere in the questioning of these two witnesses was any attempt made to prove a general custom or common practice against which to judge the conduct of Dr. Johansen. The entire line of evidence is limited to showing what each did under the circumstances and conditions existing in his department. The evidence introduced on this point all goes to show very fundamental differences existing in the operation and conduct of the three laboratories. Certainly the admission of such evidence was wrong because it could do nothing more than confuse and mislead the jury to the petitioner's injury.

This is clearly illustrated and held by the following cases:

In *Garthe v. Ruppert*, (N. Y.) 190 N. E. 643, dealing with a very similar situation, the court in reversing a judgment for plaintiff said and held:

> "The plaintiff proved, over objection and exception, that in another brewery the work was done in a better way than by Ruppert. * * * It was reasoned by the plaintiff that if other breweries could do this, then Ruppert should have done it. Such evidence is incompetent to prove negligence. * * * When, however, a custom has prevailed in the trade or in the calling, or certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that a manufacturer or any one else employing men has fallen below the required standard. *Never, however, has it been permitted to take one or two instances as a gauge or guide in place of the custom of the trade.* * * *
>
> *"What some other brewery did might have been better and safer than the ways of Ruppert, but there was no attempt to prove that what the other brewery or brew-*

eries did or had was the practice or custom or general usage in the business. For this reason it was incompetent."

Stocker v. Boston & M. R. R., (N. H.) 143 Atl. 68.
National Pressure Cooker Co. v. Stroeter (7th C. C. A.) 50 F. (2d) 642; Certiorari denied 284 U. S. 674-76 L. Ed. 570.
Carroll v. Central Counties Gas Co., 273 P. 875.
McClellan v. Pennsylvania R. Co. (2d C. C. A.) 62 F. (2d) 61.

2

The second point we make is that the instruction of the court as to this evidence only added to the confusion created by the evidence.

The instruction reads as follows:

> "THE COURT: I will reframe it, and say to the jury now, that the usual practice in other universities in respect to this or similar experiments in respect to supervision may be considered by you in determining whether or not Dr. Johansen exercised due and reasonable care in this particular instance. Such practice would not be conclusive, but it is a matter under all the circumstances of the case that you may take into consideration (R. 8, 112)."

An analysis of the instruction develops this:

In the first place, there was no evidence as to what was "the usual practice" for the conduct of a laboratory such as the one under the direction of Dr. Johansen. In the second place, there was no evidence as to what "the usual practice" was "in other universities."

To instruct the jury in such terms only the more impressed upon them the evidence which was so erroneously received and gave to it a probative force which was entirely unwarranted. In *Hough v. Stone* (Oh. 1925), 153 N. E. 313, the court said:

> "The Charge with Reference to Custom.
> "We think it was proper in this case to submit to

> the jury, if the evidence warranted it, the question whether or not there was a custom, certain, uniform, and generally acquiesced in in the neighborhood where the farm in question was located, as to the number of crates to be used for harvesting onions. *Lowe v. Lehman*, 15 Ohio St. 179. *The record in this case, however, discloses not only that there was a lack of proof as to the certainty, uniformity and generality of the custom in the neighborhood, but also that these elements were wholly overlooked in the charge of the court to the jury. There must not only be some evidence in the record as to all the elements requisite to constitute a valid custom, but those elements should also be clarified and explained in the charge to the jury.* We are therefore of the opinion that the court erred in its charge to the jury in respect to custom."

The Circuit Court in the majority opinion after a strained effort to justify the admission of the evidence and the giving of the instruction in question, finally in the third paragraph (R. 131) confesses, we think, that it is out of bounds, by saying:

> "It is generally conceded that the trial court in the exercise of its discretion is more competent to judge the exigencies of the particular case. The discretion of the trial court, when exercised within normal limits should not be disturbed. In our view, it revolves itself into essentially a practical problem *and is a concession to the purely unscientific philosophy of the law.*"

In other words, regardless of the law as cited by petitioner herein and the facts, still the court by "concession to the purely unscientific philosophy of the law" in effect says:

> "There is no law except as each court in each separate case before it may determine and declare what the court in the particular case desires the law to be."

Our position is that a review of this case is necessary to remedy what is here pronounced by the court.

3

Our third point is that petitioner at the trial was entitled to a directed verdict on the state of the record because:

(a) Respondent failed to prove any negligence as set out in her complaint.

Paragraph VII (R. 13) contained the allegations of negligence relied upon by plaintiff.

When reduced to what is really alleged it can be at most the following:

(1) That the petitioner was negligent in that, *knowing respondent to be inexperienced in chemistry, it did not warn* her of the fact that the chemicals to be used in Exercise No. 11 were highly dangerous and likely to explode with great force.

(2) That the University did not supply proper or any supervision in that Dr. Johansen left the laboratory while the respondent was there engaged in the performance of Exercise No. 11.

Judge Johnson (the trial judge) limited the allegation even more. After reading paragraph VII to the jury he said:

> "The gist of the paragraph of the complaint as I have read it to you is the charge that the defendant was negligent in failing to have its teachers or instructors, specifically Dr. Johansen, properly supervise, as plaintiff alleges, the experiment as it was being then conducted by the plaintiff and the two other girls associated with her" (R. 103).

Again to the same effect he stated the issue: (Was) "Dr. Johansen negligent in not remaining in the laboratory and overlooking the activities of the young women in the preparation for and conduct of this experiment?" (R. 105).

It is our position that Judge Johnson was right in treating the recording as failing to prove that petitioner knew respondent to be inexperienced in chemistry, and that knowing such facts it failed to warn her that the chemicals * * * were highly dangerous and likely to explode with great force.

So it is our further position that the majority opinion of the

Circuit Court is entirely wrong when it states (First Parag. R. 132):

> "The defendant undertook to instruct the plaintiff in a course of study, which involved the performance of certain experiments; *that they were hazardous and dangerous to one not learned in the science of their performance is evidenced by the result. That the plaintiff was not learned is inherent in her status as a student.* Therefore, it became the duty of the defendant to furnish instruction and supervision, and that degree of supervision is measured in quality by what an ordinary institution of this type *would* have furnished under the same or similar circumstances."

(1) Our first objection to this goes to that part of the paragraph which says: "That they (the experiments) were hazardous and dangerous to one not learned in the science of their performance is evidenced by the result."

(2) Our second objection to the court's statement is: "That the plaintiff was not learned is inherent in her status as a student."

We will consider the second statement first. Plaintiff in age and general experience was above hundreds of thousands of high school students doing this work in high schools, of which fact this court should take judicial notice. In the field of chemistry she had had much more experience than the innumerable high school students mentioned above as well as university students throughout the land, doing the same work, without accident. Isn't it more logical to say this is conclusive proof that the experiments were not dangerous? The evidence shows she had also trained in the scientific processes in physics, and yet as conclusive proof that "the plaintiff was not learned," the court says, "is inherent in her status as a student." It appears that finding no support in the evidence as set out in the record to sustain a point the court desired to make, it resorted to some unwarranted conclusions. Does it follow that an Einstein is not learned in the law of relativity

because he is a student in that field? Can the court say that a boy aspiring to be an aviator, who has passed his tests in the C. A. A., along with his army tests, and has been accepted by the army air corps, is not learned in aviation because there is so much more that he must learn and because later in his work he "cracks up"? Tested by educational endeavor or the desire to achieve in any walk of life the statement just does not fit in as a true conclusion. Isn't the fairer and more logical presumption rather, that with respondent's background and her study of this very experiment (R. 47-48) she did know something about it and was at the time engaged in demonstrating what she knew?

Now returning to point (1) above, that the experiment "to one not learned (one of which respondent was not) was hazardous and dangerous is evidenced by the result," it is our first position that that is the same argument that the happening of an accident is evidence of negligence. According to all the legal authorities for all time, negligence is never presumed from the fact of an accident, but must be affirmatively proved.

> *Phil. & R. Ry. Co. v. Thirouin* (C. C. A. 3d) 9 F. (2d) 856.

There is no evidence in this case to prove that the experiment was "hazardous and dangerous." The issue was not even made by the pleadings. The court resorts to the explosion, which it calls the "result" to prove that the experiment was hazardous and dangerous. The "result" did not come from the experiment as outlined and read by the respondent and her companion students. It came from the doing of an act by the respondent and her companions absolutely outside the experiment and which the Circuit Court designates as a mistake proximately causing the explosion. (Court's op. last line R. 132) The court can take judicial notice of the fact that chlorate is not in and of itself dangerous or working with it hazardous; that ferric oxide is not dangerous in any respect, either by itself or combined with any other element in-

volved here; that the two mixed together and heated are absolutely harmless, as is the oxygen that is generated; that collecting oxygen in a bottle is not dangerous; that phosphorus is not in and of itself dangerous, nor is it dangerous when made to burn by the application of a match, nor is it dangerous or hazardous to insert the lighted phosphorus into a bottle of oxygen. That being true, the experiment in the hands of one without any learning when carried through as outlined is not dangerous or hazardous.

We have been unable to find a case involving similar facts, but present the following cases as proof conclusive that the court is wrong in its conclusions herein set out.

In the case of *Gallenkamp v. Garvin Mach. Co.* (*N. Y.*) 99 *N. E.* 718, it was argued that a machine with a conveyor belt on it was dangerous and therefore the defendant was liable to one injured in operating the machine. In answer the court said:

> "Thus from the plaintiff's evidence it appeared that this conveyor was perfectly safe so long as a person using it did not place some portion of his body inside of the shaft between the pans, and keep it there for a sufficient length of time to allow the succeeding pans to strike him. It seems to me clear that this was not a dangerous machine as distinguished from an ordinary elevator or other moving machine used in a factory. The knowledge required to safely operate it was only that common knowledge that every one has in using machinery at all. Nothing was required for perfect safety except to keep out of the shaft. * * * "

In our case the experiment "was perfectly safe so long as a person" performing it followed the manual. The knowledge required to safely "perform the experiment" was only that knowledge common to high school and beginning university students.

In *Capps v. Carpenter* (Kan.) 283 P. 655, it was contended by the plaintiff that an "air gun" in the hands of a small boy was a dangerous instrument. In answering the court said not.

Applying the same reasoning to the experiment, it was always the same whether in the hands of Dr. Johansen or the girls. It was to be performed in exactly the same way without possible harm to anyone.

The cause of the accident was that the girls, through not paying proper attention to the directions concerning the experiment, put phosphorus, a test material to be used only after the oxygen had been generated and collected in a bottle, into the generating tube already containing chlorate and applied the heat.

In *Ford v. Coml. Motor Freight* (Ohio) 14 N. E. (2d) 354-357, the court clearly sets out the law applicable to the case at bar.

> "The work of conveying coils of wire across a sidewalk and depositing them in the adjoining building was proper and contained no elements of unusual danger to anyone. Whatever danger developed resulted from the manner in which those engaged did it and their failure to exercise care while so engaged. If it can be said that delivering a roll of ordinary wire is inherently dangerous, it would be difficult to conceive of any human activity that could not be so characterized with equal regard to realities."

See also *Gulland v. Northern C. & D. Co.* (Wis.) 132 N. W. 755-756.

So, in conclusion we say respondent's "status as a student" does not establish inherently that she "was not learned" and that that in turn proved conclusively that she was inexperienced and therefore not accountable for her mistake. And further, we say that the "result" does not evidence that the experiment was hazardous and dangerous, nor do the pleadings or the evidence give basis for any such conclusion.

(b) Respondent failed to prove any negligence on the part of petitioner that proximately caused the accident.

Back to Judge Johnson's question (R. 105): (Was) "Dr. Johansen negligent in not remaining in the laboratory."

There is no proof that he was. Dr. Quinn said:

> "It would be quite difficult to observe as to whether or not they were using or not using the proper chemical materials as the student proceeds."

Miss Kay testified:

> "When in the laboratory he (Dr. Johansen) would walk around; if we wanted special attention we would call for him to come and help us. That was the case when he was helping us before the regular class came. When the regular class was on he would only be with us at such times as we might ask for his attention particularly and all the rest of the period he might have been with other people the distance of the laboratory away from us. I didn't keep track as to how long he was with us in performing Exercise No. 10. I think he would come and help us and then walk away, then we would come and have him help us again when we were further along. He was with us just those times when we would call for him to come and see us" (R. 37-38).
>
> "After we had mixed the chemicals we were hesitant about applying the Bunsen burner and I expressed some doubt to the girls about doing so as I had never taken any chemistry before and I always had a fear of using the Bunsen burner and the chemicals in the laboratory. I was hesitant at this particular time, just as I was about other experiments, and I said to the other girls 'I wonder if it is all right. I don't like to put the burner there.' One or both of the girls urged me to go ahead. I don't remember whether it was one or both. It might be either one or both of them" (R. 39).

Respondent on the same point said she and her companions "could have waited until he (Dr. Johansen) came back but to the best of my knowledge it was all right" (R. 48). It must follow

that if Dr. Johansen had been in the room he would not have been called to prevent this explosion.

The case as we view it falls exactly within the facts and the law as set out and declared by Judge Cardozo in *Hamburger v. Cornell University,* (N. Y.) 148 N. E. 539, 42 A. L. R. 955-963. In that case the plaintiff, a student at the University, was assigned to perform two experiments at one particular laboratory period both of which, as in our case, involved the use of potassium chlorate with another chemical. The first experiment was performed without accident. In the performance of the second experiment plaintiff used a wrong chemical and an explosion occurred, as a result of which the plaintiff lost an eye. In this case the decision in favor of the University went off on the ground that it was exempt from liability because of being an eleemosynary institution. However, in discussing the negligence point, the court said:

> "In the absence of any evidence of some defect in the mercuric sulphide, the key to the explosion would seem to be in the presence of the potassium chlorate. *If the plaintiff took this out of a bottle properly labeled when she should have taken lime from another bottle, the explosion was her own fault, and so the court charged.* If her recollection is accurate that she used a bottle labeled lime, then, since no lime was found upon her desk, the inference may be drawn that, through the fault of an instructor, the bottle was mislabeled. For some reason, the trial judge discarded this theory of negligence, and declined, with the plaintiff's acquiescence, to submit it to the jury. We may doubt whether other negligence is chargeable to anyone. For the purpose of this appeal, we assume that the plaintiff is not barred by the theory of the trial from sustaining a denial of the motion for the dismissal of the complaint upon any theory now shown to be supported by the evidence. She gains nothing from the assumption. *The difficulty remains that only conjecture or suspicion can impute negligence to any one except in circumstances relieving the university of liability for the wrong of the delinquent.*"

In our case there is no evidence that there was any wrong labeling. To say that the accident was caused in any other way than that the girls wrongly mixed phosphorus, which they themselves labeled, with potassium chlorate taken from a bottle properly labeled is to require one to conjecture a set of facts not warranted by the evidence. The following cases hold against submitting such a case to the jury:

Quinn v. Utah Gas & Coke Co. (1912) 42 Utah 113, 129 P. 362.
Busse v. Murray Meat & Livestock Co. (1915) 45 Utah 596, 147 P. 626.
Tremelling v. Southern Pac. Co. (1917) 51 Utah 189, 170 P. 80.
Fee's Admrx. v. Mahan-Ellison Coal Corp. (Ky. 1931) 43 S. W. (2d) 681.
F. W. Woolworth v. Davis (C. C. A. 10th) 41 F. (2d) 342.
Watkins v. Piggly Wiggly Bird Co. (C. C. A. 8th) 31 F. (2d) 889.
Steggell v. Salt Lake & U. R. Co., 50 Utah 139, 167 P. 237, 240.
Bullock v. Luke et al, 98 Ut. 501, 98 P. (2d) 350.
Skelly Oil Co. v. Chambers (C. C. A. 10th) 87 F. (2d) 853.

(c) Respondent proved affirmatively that she was guilty of negligence that proximately contributed to the accident and the jury so found (R. 27, question and answer No. 7).

See evidence submitted B 22.

In the opinion of the majority of the Circuit Court a violent assumption is made and stated "that Dr. Johansen instructed the plaintiff and others to proceed to perform a dangerous experiment"* * * (Line 11—Second Parag.) (R. 132). There is nothing in this record to sustain such a statement.

Again the opinion sets out (Line 2 R. 133):

> "Although there appears to be some inconsistency in the answers made to the interrogatories the jury did find in answer to an interrogatory that assuming a mistake was made in mixing red phosphorus and potassium chlorate, that such mistake was caused by the failure of Dr. Johansen to use reasonable and ordinary care in supervising the performance of the experiment, which *in effect reaches the conclusion that those performing the experiment, including plaintiff, did make a mistake and that the mistake proximately caused the explosion, but the failure of the defendant to properly supervise, proximately caused the mistake.*"

In analyzing this proposition it seems to us the following is the result:

1. That Dr. Johansen's failure to use ordinary and reasonable care in supervising caused the mistake.
2. That the girls, including plaintiff, in proceeding with the experiment negligently made a mistake, and that the mistake proximately caused the explosion.

The first thing that strikes us about such a proposition is this: How can it be said Dr. Johansen caused the mistake when,

1. The girls say they only called the Doctor when they needed him to explain something (R. 37-38).
2. That at the time in question here they were sure they didn't need him and didn't even think of calling him or waiting for him even though one of the girls was hesitant about going forward, and
3. When Dr. Quinn's testimony is that even if Dr. Johansen were in the room it isn't likely he would have observed that the girls were using the wrong chemical?

The second thing that strikes us about such a proposition is this: Following the logic presented by the court there would

never be a case of contributory negligence, because it could always be said that while the second party made a mistake, the first party caused the mistake. The girls knew Dr. Johansen was out of the room; they had the caution that very afternoon to be careful about the use of chlorate; there was the feeling of one of them that they should wait; the fact that the Doctor was out of the room would never have caused an explosion; the affirmative, active cause was the girls actually mixing phosphorus with chlorate and applying the heat. Don't such facts create a duty on the girls to determine their course, the breach of which admittedly resulted in a mistake and the explosion? If that be true that was the negligence which, the jury said, proximately caused the explosion. The jury so found in answer to question No. 7.

The law of Utah is that where an accident is caused by the negligence of one party, but the undisputed evidence establishes that the cause thereof is proximately contributed to by the other party to the accident the second party as a matter of law cannot recover.

The following cases state the law on this point:

Bates v. San Pedro L. A. S. L. R. Co., 38 Utah 568; 114 P. 527.
Moose v. Galigher Machinery Co., 51 Utah 504; 171 P. 153.
Knight v. Southern Pac. Co., 52 Utah 42; 172 P. 689.
O'Brien v. Alston, 61 Utah 368; 213 P. 791.
Dolley v. Mid-Western Dairy Products Co., 80 Utah 331; 15 P. (2d) 309.
Bullock v. Luke, 98 Utah 501; 98 P. (2d) 350.

(d) Respondent assumed the risk of the ordinary and obvious dangers incident to her work.

Dingman v. Mattock Co. (Cal. 1939) 96 P. (2d) 821.
Benjamin v. Nernberg (Pa. 1931) 157 A. 10.
Branchi v. South Park Presbyterian Church, et al, (N. J. 1939) 8 A. (2d) 567-571.

For these reasons this court should review the decision of the Circuit Court.

4

The fourth point petitioner relies upon in support of its petition is that as an University, almost entirely supported by funds appropriated to it by a church organization and endowments from individuals, it is entitled to exemption from liability in this case.

The reasons for this position are these:

(a) That as stated by Judge Phillips in his dissenting opinion the law of Utah exempts petitioner under the facts set out in this record (R. 142).

An analysis of the second Dee Hospital opinion by Justice Moffatt clearly demonstrates that he has limited the law of that case in its application to a case such as this.

In proceeding to the determination of the issues Justice Moffatt frames this question:

> "When an institution, association, person, or corporation undertakes by contract for pay to perform a specified service, such as set out in the plaintiff's complaint, may the defense of a 'charitable' shield, as against a pleaded and admitted negligence, be invoked?"

The judge then goes on to state that with this question in mind the next question is: "Does the complaint, the allegations of which have been summarized, state a cause of action?" Then after further comment in which he discusses the question of whether charitable institutions are exempt from liability he submits a third question in this form: "But why should a charitable institution be excepted?" and then in answer quotes from "Perry on Trusts" as follows:

> "'It is almost universally held that those who are receiving the benefits of the charity, for example, patients, at a charitable hospital or pupils at a school or college which is a public charity, cannot recover from the corpora-

> tion or from the trustees for injuries due to the negligence of an employee, where it does not appear that there was negligence in selecting the employee.' Vol. 2, 7th Ed. section 745."

If we understand his decision up to this point it is to the effect that those receiving the benefits of a charity cannot recover from the charity for injuries received except for negligence in selecting the employee. He appears to emphasize that point later on in his decision where he says, "It is, however, generally held that, as to beneficiaries, if the charity had exercised due care in the selection of its servants, the recipient of the charity may not recover in an action against the charity." In the next paragraph of his opinion he states the question to be "as to whether the complaint states facts sufficient to constitute a cause of action in negligence for a service undertaken on contract for pay notwithstanding that, internally it (the institution) may be classed as a charity," but at the same time by its articles may sue and be sued and receive patients for and collect compensation from them.

He then submits the fourth question. "Is it (the charitable institution) exercising a charitable function as a matter of law under the facts stated?" Then he quotes from the articles of the hospital and follows with this query which is quoted from a previous decision in this same case: "Does the contract for pay take the institution out of the protection of the rule, *or, in so far as the contract for pay is concerned*, make the institution a business institution not subject to the charitable immunity?" After further consideraion of various questions he concludes:

> "Put otherwise, where a contract involves an agreement to perform a service for compensation or pay, although the general purposes of the actor may be charitable, yet, in the particular instance the general character or purposes of the actor may not without more be invoked as a defense as a matter of law against actual negligence,

whether pleaded in the complaint or by way of answer or defense."

At this point, as we understand the court, he has apparently reached this conclusion, that the hospital in question is a charitable institution. Next, the court seemingly holds, that where the party injured was received as a pay patient and compensation paid for him he is not cut off from recovery. But going on in his opinion the court, as if having in mind our very case, states this exception to the rule he has arrived at up to this time: *"There are combinations where the contract for service so predominates as to justify the conclusion that the actor was performing a pure charity."* Our contention is that in this case petitioner paid so little for what she got that the "service so preponderates (over what she paid) as to justify the conclusion that the actor (the University) was performing a pure charity."

There is one other point invoked in the decision of the second Dee Hospital case that this court should be advised of. It is this:

Justice Moffatt, in writing his decision, relied strongly upon the decision of the Idaho Supreme Court in *Henderson v. Twin Falls County*, 56 Idaho 124, 50 P. (2d) 597, 101 A. L. R. 1151. This case was one involving the operation of a county hospital where the Idaho Supreme Court held that one injured in the hospital might recover from the hospital. At the time the Dee Hospital case was pending in the Supreme Court in Utah there was pending in the Supreme Court of the State of Idaho the case of *Wilcox v. Idaho Falls Hospital*, 82 P. (2d) 849, involving the same question as was involved in the Utah case, the Idaho Falls Hospital being operated by the Church of Jesus Christ of Latter-day Saints. After the Utah Supreme Court had handed down the decision in the Dee Hospital case, basing its judgment upon the Twin Falls County hospital case as support for its throwing over the eleemosynary exemption rule, and Justice Wolfe in his concurring opinion going so far as to list Idaho as one of those states that had repudiated said doctrine, the Idaho

Supreme Court apparently without knowledge of the Utah case, handed down its decision in the Idaho Falls Hospital case granting exemption from negligence. In that case the Idaho court distinguished the Twin Falls County Hospital case and sustained the rule of exemption to the Idaho Falls Hospital as an eleemosynary institution. When the Utah decision was brought to the attention of the Idaho Supreme Court upon a motion for a rehearing, that court granted a rehearing in the Idaho Falls Hospital case but after the rehearing was had and the Utah case considered by it, the court affirmed its previous judgment that so far as Idaho was concerned the rule of exemption from liability in such cases was still the law of that state.

An illuminating discussion of this very situation appears in an article in the Insurance Counsel Journal for October, 1939, at page 23.

(b) All decided cases, both state and federal, apply the rule of exemption to institutions in cases like the one at bar.

> Hamberger v. Cornell University, (N. Y.), supra.
> Parks v. Northwestern University (Ill.), supra.
> Ettlinger v. Trustees of Randolph Macon College, supra.
> Higgins v. Pratt Institute, supra.

(c) To permit this decision to stand will submit petitioner and such institutions as petitioner to innumerable claims and probable losses at a time when their respective incomes are greatly reduced by lack of earning power on the part of their assets.

IV

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order to relieve petitioner of the injustice imposed upon it by the judgment as it now stands, and that to such an end a writ

of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit and finally reverse it.

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JUL 14 1941
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

BRIGHAM YOUNG UNIVERSITY,
PETITIONER AND APPELLANT,

VS.

EDITH CANNON LILLYWHITE,
RESPONDENT AND APPELLEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF RESPONDENT AND APPELLEE

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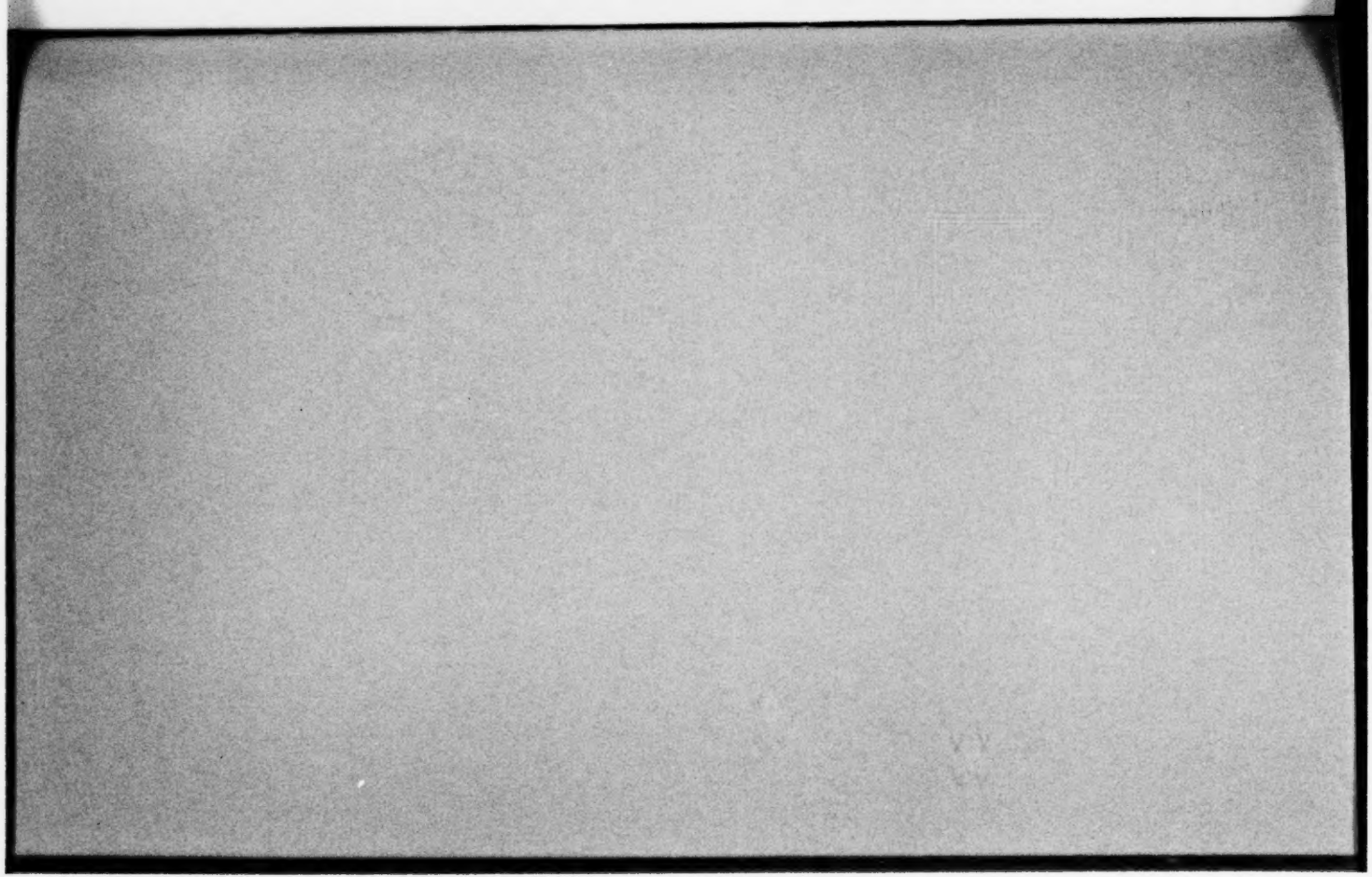

SUBJECT INDEX

	Page
SUMMARY SUPPLEMENTAL STATEMENT	1
BASIS OF COURT'S JURISDICTION	3
QUESTIONS PRESENTED	4
REASONS RELIED UPON FOR ALLOWANCE OF WRIT	11
CONCLUSION	12

AUTHORITIES CITED

Ahern v. Livermore Union High School, (Cal. Sup. Ct.) 208 Cal. 770, 284 Pac. 1105	7
Alabama Baptist Hospital Board v. Carter, 226 Ala. 109, 145 So. 443	10
Bellman v. San Francisco High School, (Cal. Sup. Ct.) 11 Cal. (2d) 576, 81 Pac. (2d) 894	8
Boehmer v. Pennsylvania R. R. Company, 252 U. S. 496	12
Chicago, Great Western Ry. Co. v. McDonough, (8th C. C. A.) 161 Fed. 657	6
Chicago, Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., (8th C. C. A.) 176 Fed. 237	5
Chicago Junction R. R. Company v. King. 222 U. S. 222, 56 L. Ed. 173	12
Dolan v. Boott Cotton Mills, (Mass.) 70 N. E. 1025	6
England v. Hospital of the Good Samaritan, (Cal. Sup. Ct.) 14 Cal. (2d) 791, 97 Pac. (2d) 813	10
Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188	3
Geiger v. Simpson Methodist Episcopal Church of Minneapolis, 174 Minn. 389, 219 N. W. 463	10
General Talking Picture Corporation v. Western Electric Company, 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849	12
Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n, 32 Utah 46, 88 Pac. 691	10
Glaven v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675	10
Groesbeck v. Lake Side Printing Co., 55 Utah 335, 186 Pac. 103	7
Henry v. Garden Grove High School, 119 Cal. A. 638, 7 Pac. (2d) 192	7
Hewett v. Women's Hospital Aid Ass'n, 73 N. H. 556, 64 Atl. 190	10
Hillier v. The Governors of St. Bartholomew's Hospital, 9 B. R. C. 1, 9, 78 L. H. K. B. (N. S.) 9558, 101 L. T. N. S. 368	11
Holland v. Oregon Short Line Railroad Co., 26 Utah 209, 72 Pac. 940	7
John Potter, et al. v. Dr. W. H. Groves Latter-Day Saints Hospital	9
LaVere v. Smith's Falls Public Hospital, 35 Ont. L. Rep. 98	11

Page

Mary Fritz, et al. v. Western Union, et al.,
25 Utah 263, 71 Pac. 209 5

Mastrangelo v. West Side Union High School Dist.,
2 Cal. (2d) 540, 29 Pac. (2d) 885, 42 Pac. (2d) 634 7

McGar v. National Providence Worsted Mills,
22 R. I. 347, 47 Atl. 1092 5

Mulliner v. Evangelischer Dia. of Minn. District,
144 Minn. 392, 175 N. W. 699 10

Northam, et al. v. Boston & Montana Consolidated Co.,
(9th C. C. A.) 190 Fed. 722 5

Ohio Copper Mining Co. v. Hutchings, et al.,
(8th C. C. A.) 172 Fed. 201 5

Parrish v. Clark, 107 Fla. 598, 145 So. 848 10
Perrin v. Union Pacific Railroad Co., 59 Utah 1, 201 Pac. 405..... 8, 9
Peterson v. Richards, 73 Utah 59, 272 Pac. 229 8

Putnam Memorial Hospital v. Allen,
(2nd C. C. A.) 34 Fed. (2d) 927 11

Roach v. Los Angeles, Etc. R. Co., 74 Utah 545, 280 Pac. 1053..... 9

Ruhlin v. New York Life Insurance Company,
304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290 12

Sessions v. Thomas D. Dee Memorial Hospital Ass'n,
94 Utah 460, 78 Pac. (2d) 645 ..... 4, 9, 10
Shawnee v. Roush, 101 Okla. 60, 223 Pac. 354 10

Sheehan v. North Country Community Hospital,
273 N. Y. 163, 7 N. E. (2d) 28 10

Silva v. Providence Hospital of Oakland,
14 Cal. (2d) 762, 97 Pac. (2d) 798 10

Silver Falls Timber Co. v. Eastern & Western Lumber Co.,
149 Ore. 126, 40 Pac. (2d) 703 5

Sisters of the Sorrowful Mother v. Zeidler,
183 Okla. 454, 82 Pac. (2d) 996 10

Southern Power Co. v. North Carolina Public Service Co.,
263 U. S. 508, 68 L. Ed. 413 12
Spackman v. Benefit Association, 97 Utah 91, 89 Pac. (2d) 490..... 8

Spiking v. Consolidated Ry. & Power Co.,
33 Utah 313, 93 Pac. 838 5

Sporsem v. First Nat. Bank of Poulsbo,
133 Wash. 199, 233 Pac. 641 5

Stone & Webster Engineering Co. v. Melovich,
(9th C. C. A.) 202 Fed. 438 5

Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4 10

United States of America v. Johnston,
268 U. S. 220, 69 L. Ed. 925 12

Ward v. Denver & R. G. W. R. Co., 96 Utah 564, 85 Pac. (2d) 837 9
Welch v. Frisbie Memorial Hospital, (N. H.) 9 Atl. (2d) 761 10

TEXTS:

20 R. C. L., Section 95, page 109 8

Wigmore, Vol. 2, Section 461, Pages 488-90 5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

BRIGHAM YOUNG UNIVERSITY,
PETITIONER AND APPELLANT,

VS.

EDITH CANNON LILLYWHITE,
RESPONDENT AND APPELLEE.

BRIEF OF RESPONDENT AND APPELLEE

SUMMARY SUPPLEMENTAL STATEMENT.

The petitioner, Brigham Young University, has set forth in its petition a statement of facts and respondent, therefore, sets forth herein a supplementary statement only.

At the time Edith Cannon Lillywhite suffered the loss of her eye through the explosion, on account of which this action was prosecuted, she was a freshman student with no high school chemistry experience, and the laboratory period during which the explosion occurred was the first in which respondent and her two freshman girl companions had used chemical properties.

Experiments 10 and 11, on which the girls were working, were companion experiments involving the use of chemical

properties, including lead dioxide, mercuric oxide, iron oxide, manganese dioxide, oxone or sodium peroxide, hydrogen peroxide, potassium chlorate, potassium permanganate and sulphuric acid. Ferric oxide was provided to be used as a substitute for manganese dioxide and was furnished the students in this case. It is a reddish rust color. Manganese dioxide is a black powder. Red phosphorus or iron phosphorus is also reddish in laboratory form, and the use of red phosphorus or phosphorus dioxide in place of ferric oxide and in combination with potassium chlorate is very dangerous. An experienced chemical instructor could, by supervisory observation, determine the difference between sulphur or phosphorus and ferric oxide when mixed with potassium chlorate. With ferric oxide and red phosphorus or sulphur furnished the students, and the three working together at one desk with these ingredients, it would be and was easy to make a mistake in using red phosphorus or sulphur instead of ferric oxide.

Petitioner's statement that five laboratory periods had been previously attended by the three girls is somewhat misleading as these periods were not devoted to the performance of exercises involving chemical properties, but only to familiarizing the students with apparatus, and the explosion actually occurred during the very first laboratory period at which chemical ingredients were mixed.

No instructor was present during the performance of Exercise 11 as Dr. Johannesen had left the three girls to proceed with the experiment without any supervision. Afton K. Anderson, one of the girls, testified that she did not recall any warnings by Dr. Johannesen concerning the chemicals or that he wanted to see the experiment performed. No instructor inspected the equipment or the chemical properties, and she did not remember that any warning had been given not to proceed until the equipment and materials had been checked; that if any warning had been given, she thought they would have waited as such would not have missed her recollection. She was quite sure Dr. Johannesen did not say anything before he left the laboratory about waiting until his return, but left after telling them to get their equipment and set up and do No. 11.

Instructor Harvey Howell and Dr. Elton L. Quinn pointed out not only the dangers involved in the performance of this particular experiment, but the fact that elementary chemistry students in other schools are not permitted to perform such experiments except working singly or in pairs

under the careful supervision of instructors; that only when necessary were students permitted to work even in pairs, and in such instances one set up the equipment and the other handled the chemical properties to avoid confusing or wrongly mixing ingredients by two or more students handling them.

The jury, in addition to returning a general verdict against petitioner, consistently answered special interrogatories by finding (1) that plaintiff was not negligent; (2) that defendant was negligent in that Dr. Johannesen left the room; (3) that Dr. Johannesen was negligent in not remaining in the laboratory and overlooking the activities of the young women; (4) that Dr. Johannesen did not instruct the girls to proceed with the experiment "to its end;" (5) that he did not instruct them to await his return before completing the experiment; (6) that claimant was not guilty of negligence proximately contributing to the explosion; (7) that one of the girls negligently mixed the wrong chemicals; (8) that the proximate cause of the accident was not the mistake of plaintiff or her girl companions; and (9) that the mistake was the result of the failure of Dr. Johannesen to use reasonable and ordinary care in supervising the three girls.

It is clear from the record that the jury was justified in concluding that the proximate cause of the explosion was the negligence of the Brigham Young University, through Dr. Johannesen, in permitting and directing three inexperienced freshman girls to work together in the performance of a dangerous experiment, unsupervised and substantially uninstructed, while he was out of the laboratory.

BASIS OF COURT'S JURISDICTION.

In seeking a review, petitioner urges that the Tenth Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, and that this case presents an important public question for determination by this Court.

Respondent cannot appreciate either the importance of the question or that its determination by this Court will affect the rule of law either in the State of Utah or any other state, as the Federal Courts, since the case of *Erie Railroad Company vs. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, are bound to apply the state law.

The question of whether the Brigham Young University is liable for the negligence of its instructor under the facts involved in this case has been passed upon by the Honorable Tillman D. Johnson, District Judge, for fifty years familiar with Utah law, and by the Tenth Circuit Court of Appeals. Both these Courts had before them the entire record in the controlling Utah case of *Sessions vs. Thomas D. Dee Memorial Hospital Association,* including the transcript of record, briefs and the Amicus Curiæ petition and brief on rehearing filed by Brigham Young University and Dr. W. H. Groves Latter-Day Saints Hospital, wherein the Mormon Church sought a rehearing in the Sessions case, calling the Supreme Court's attention to this case, then pending, and the probable liability of the Brigham Young University to respondent under the decision in the Sessions case, which held that a charitable institution is legally responsible to a contract pay patient for the negligence of its employees.

In this case, respondent was admittedly a contract pay student and not attending under a scholarship or reduced tuition as a widow's daughter. She paid the full tuition of $75.00.

While it is now the settled rule in Utah that eleemosynary institutions are liable to contract pay patients or students, nevertheless, this Court could not by any decision change or modify the Utah rule or have any effect in determining the rights of other claimants in either the state or the federal courts.

It is respectfully suggested that in view that the United States District Court for Utah and the United States Circuit Court of Appeals have interpreted the Utah law with all possible assistance, this Court should conclude that petitioner has fully presented this question to appropriate tribunals and now seeks nothing more than a new trial as evidenced by its argument and authorities on questions of evidence, negligence, contributory negligence, proximate cause, and jury instructions.

QUESTIONS PRESENTED.

Respondent will consider petitioner's questions in the order set forth in its Petition and Brief.

1. It is urged that the Circuit Court of Appeals erred in sustaining the admission of the testimony of Instructor Harvey Howell and Dr. Elton L. Quinn. The Circuit Court

of Appeals effectively disposed of this question in its opinion reported in 118 Federal Reporter, Second Series, page 836. It is there pointed out that this evidence was not admitted for the purpose of establishing a standard of care or duty on the part of petitioner by which petitioner's liability should be determined, but that the same should be considered by the jury with all other evidence in determining whether petitioner exercised that care required of an ordinarily prudent person. The trial court clearly called the jury's attention to the limited purpose of the evidence, that is to enable it to know how many different ways laboratory classes might be conducted, and it would then be left entirely to the jury to determine whether the defendant was or was not negligent.

This evidence was properly admitted pursuant to appropriate instructions.

Wigmore, Volume 2, Section 461, pages 488-90, points out the distinction between evidence received to establish a standard of conduct and that received properly, with an express caution that it is merely evidential. This is precisely the rule applied by the trial court and sustained by Utah and other authorities.

Silver Falls Timber Co. v. Eastern & Western Lumber Co., 149 Ore. 126, 40 Pac. (2d) 703;

Mary Fritz, et al. v. Western Union, et al., 25 Utah 263, 71 Pac. 209;

Spiking v. Consolidated Ry. & Power Company, 33 Utah 313, 93 Pac. 838;

Ohio Copper Mining Co. v. Hutchings, et al., (8th, C. C. A.) 172 Fed. 201;

Chicago, Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., (8th C. C. A.) 176 Fed. 237;

Northam, et al. v. Boston & Montana Consolidated Co., (9th C. C. A.) 190 Fed. 722;

Stone & Webster Engineering Co. v. Melovich, (9th C. C. A.) 202 Fed. 438;

Sporsem v. First Nat. Bank of Poulsbo, 133 Wash. 199, 233 Pac. 641;

McGar v. National Providence Worsted Mills, 22 R. I. 347, 47 Atl. 1092;

Dolan v. Boott Cotton Mills,
(Mass.) 70 N. E. 1025;

Chicago, Great Western Ry. Co. v. McDonough,
(8th C. C. A.) 161 Fed. 657.

2. It is urged that the Circuit Court of Appeals erred in sustaining the trial court in instructing the jury concerning the practices in other universities. Dr. Quinn of the University of Utah, and formerly of the New Mexico State School of Mines and Princeton University, was familiar with the practices in such schools. The trial court's instructions clearly pointed out that the fact that petitioner may not have conducted its laboratories as other laboratories were conducted did not establish negligence. It said:

> "I want to find out how many different ways it could be done. Then the question ultimately would be if your man did a little differently from this witness or some other witness, whether the jury would say one was negligent and the other was not, or both were negligent, or both were right."

The jury was further instructed that

> "The practice in other universities in respect to this or similar experiments may be considered by you in determining whether or not Dr. Johannesen exercised due and reasonable care in this particular instance. Such practice would not be conclusive, but it is a matter under all the circumstances of the case that you may take into consideration."

It was properly left for the jury to determine whether the manner of petitioner's operation of its laboratory on the particular occasion was reasonable and prudent or negligent.

(See authorities under Question 1.)

3. The petitioner claims that the Circuit Court of Appeals erred in sustaining the trial court in denying its motion for a directed verdict as (a) respondent failed to prove negligence; (b) respondent failed to prove petitioner's negligence proximately caused the accident; (c) that the evidence established respondent's contributory negligence; (d) that respondent assumed the dangers incident to the

course; and (e) that petitioner is exempt from liability as an eleemosynary institution.

By answering points (a) to (e) inclusive, under Question 3, Questions 4 and 5, on page 10 of the Petition, will be necessarily disposed of.

(a) Respondent established that the explosion occurred due to petitioner permitting three inexperienced freshman girl students to proceed with the performance of the experiment without personal instruction or supervision by any instructor or supervisor in the laboratory. Under well recognized Utah law, the questions of negligence, contributory negligence and proximate cause were questions of fact to be determined by the jury where the evidence was in conflict or dispute or even undisputed, if reasonable minds might reach different conclusions or inferences from the facts.

In *Groesbeck v. Lake Side Printing Co.*, 55 Utah 335, 186 Pac. 103, an inexperienced boy employee reached into the press feeder for a piece of paper and injured his hand. It was claimed that the boy was contributorily negligent in placing his hand in the press feeder. A verdict against the printing company was sustained, the Supreme Court of Utah saying:

> "The evidence must be considered and applied most favorable to the plaintiff's cause of action * * * the question of whether the immature mind should be required to suffer the consequences of his actions in view of a particular train of circumstances, always presents a more or less delicate question which should not be too hastily determined by the court as a matter of law. We are of the opinion that whether under all the circumstances, it was negligence not to instruct or to warn the plaintiff, was also a question of fact for the jury and not one of law for the court."

Holland v. Oregon Short Line Railroad Co., 26 Utah 209, 72 Pac. 940;

Mastrangelo v. West Side Union High School Dist., 2 Cal. (2d) 540, 29 Pac. (2d) 885, 42 Pac. (2d) 634;

Ahern v. Livermore Union High School, (Cal. Sup. Ct.) 208 Cal. 770, 284 Pac. 1105;

Henry v. Garden Grove High School, 119 Cal. A. 638, 7 Pac. (2d) 192;

Bellman v. San Francisco High School,
(Cal. Sup. Ct.) 11 Cal. (2d) 576, 81 Pac. (2d) 894;

Perrin v. Union Pacific Railroad Co.,
59 Utah 1, 201 Pac. 405;

Peterson v. Richards,
73 Utah 59, 272 Pac. 229;

Spackman v. Benefit Association,
97 Utah 91, 89 Pac. (2d) 490.

(b) The law of Utah is well settled to the effect that proximate cause is a question of fact for the jury. It cannot be successfully argued that a failure of warnings, instructions and supervision, and the careless permitting of three young girls to proceed under the circumstances disclosed by the evidence, was not the proximate cause of the mixing of wrong chemical ingredients and thus the proximate cause of the explosion and resulting accident.

(c) There was no evidence that plaintiff was contributorily negligent, and the jury specifically found that she was not negligent; that neither her negligence nor that of the other girls was the proximate cause of the explosion, but on the contrary that the negligence of Dr. Johannesen was the proximate cause. Respondent did not participate in mixing the chemical properties. Even if she had herself mixed them, her doing so under the circumstances would be excusable because of the failure of the petitioner to take proper precautions to guard against a danger which its instructor should have known and, under the circumstances, guarded against.

(d) Respondent, as an inexperienced student, assumed no risks, at least none that petitioner should have guarded against. The doctrine of assumed risk has never been recognized in Utah except in master and servant cases. As stated in *20 R. C. L., Section 95, page 109:*

> "It frequently is asserted that the doctrine of assumption of risk has no application except between master and servant."

Even in master and servant cases, the servant does not assume risks or dangers resulting from the master's negli-

gence, and the only related rule which could apply in this case is the rule of contributory negligence.

Ward v. Denver & R. G. W. R. Co.,
96 Utah 564, 85 Pac. (2d) 837;

Roach v. Los Angeles, Etc., R. Co.,
74 Utah 545, 280 Pac. 1053;

Perrin v. Union Pacific R. Co.,
59 Utah 1, 201 Pac. 405.

(e) Petitioner is not exempt from liability to a contract paying student and it is questionable, under existing Utah law, that exemption exists even in charity cases.

Since the recent decision in *Sessions v. Thomas D. Dee Memorial Hospital Association*, 94 Utah 460, 78 Pac. (2d) 645, the trial courts have held that charitable or eleemosynary institutions are liable to contract patients or students and have submitted issues of negligence to the jury. In *John Potter et al. v. Dr. W. H. Groves, Latter-Day Saints Hospital*, deceased paid nothing, but was sent to the hospital by the religious ward in which she lived. The standard service charge for the services rendered was $55.30, on account of which the ward contributed only $10.00 without designation of application of such payment to the particular account. While it was held there was no negligence, the question of liability was submitted to the jury, and the Dr. W. H. Groves Latter-Day Saints Hospital, in its brief, pointed out that in the Sessions case it was held "that a hospital, in the case of a pay patient was liable for the death of the patient resulting from the negligent act of one of the hospital nurses."

In the Sessions case, the Supreme Court of Utah disposed of the eleemosynary or charitable purpose of the hospital and its liability resulting from the negligence of its employees by clearly holding that no question of public policy was involved. It was stated that while the Legislature of Utah had exempted charitable institutions from tax liability, the Legislature had not seen fit to determine that public policy dictated that such institutions should be exempt from legal liability in cases where a charge was made for services rendered and a contract relationship thereby arose. A thorough analysis of the decision in the Sessions case, with the record and authorities relied upon, including the Amicus Curiæ brief on rehearing in behalf of Brigham Young University, clearly establish that in Utah though an insti-

tution is legally and actually eleemosynary or charitable, it is not exempt from liability on account of the tort of its agent where the claimant bears a contract relationship to it and pays the required compensation. Such is not only the Utah law, but that of a number of other jurisdictions, and in California public schools supported by the taxpayers are similarly responsible.

Sessions v. Thomas D. Dee Memorial Hospital Ass'n, 94 Utah 460, 78 Pac. (2d) 645;

Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n, 32 Utah 46, 88 Pac. 691;

Silva v. Providence Hospital of Oakland, 14 Cal. (2d) 762, 97 Pac. (2d) 798;

England v. Hospital of the Good Samaritan, (Cal. Sup. Ct.) 14 Cal. (2d) 791, 97 Pac. (2d) 813;

Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4;

Alabama Baptist Hospital Board v. Carter, 226 Ala. 109, 145 So. 443;

Mulliner v. Evangelischer Dia. of Minn. District, 144 Minn. 392, 175 N. W. 699;

Geiger v. Simpson Methodist Episcopal Church of Minneapolis, 174 Minn. 389, 219 N. W. 463;

Hewett v. Women's Hospital Aid Ass'n, 73 N. H. 556, 64 Atl. 190;

Welch v. Frisbie Memorial Hospital, (N. H.) 9 Atl. (2d) 761;

Shawnee v. Roush, 101 Okla. 60, 223 Pac. 354;

Sisters of the Sorrowful Mother v. Zeidler, 183 Okla. 454, 82 Pac. (2d) 996;

Sheehan v. North Country Community Hospital, 273 N. Y. 163, 7 N. E. (2d) 28;

Parrish v. Clark, 107 Fla. 598, 145 So. 848;

Glaven v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675;

Hillier v. The Governors of St. Bartholomew's Hospital, 9 B. R. C. 1, 9, 78 L. H. K. B. (N. S.) 9558, 101 L. T. N. S. 368;

LaVere v. Smith's Falls Public Hospital, 35 Ont. L. Rep. 98;

Putnam Memorial Hospital v. Allen, (2nd C. C. A.) 34 Fed. (2d) 927.

4. Petitioner's Motion for Judgment Notwithstanding the Verdict was based particularly upon Point (e) under Point 3 above. It has already been noted that the trial court and the Circuit Court of Appeals of the Tenth Circuit held that the law of Utah as established by the Sessions case, determined petitioner's liability.

5. The ruling of the Circuit Court of Appeals in sustaining the trial court's denial of petitioner's Motion for a New Trial is consistent with its ruling on the Motion for a Judgment Notwithstanding the Verdict, and the submission of the case to the jury.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

Petitioner urges that this Court should say whether or not, under the law of Utah and other state and federal cases, the decision of the Circuit Court of Appeals should be allowed to stand and establish the law. We have pointed out that a decision by this Honorable Court cannot establish the law, and certainly decisions from other states or the United States Supreme Court or other federal courts cannot establish the law of Utah.

If a decision by this Court cannot affect the law in Utah, or any other state, no public interest is involved and nothing could be accomplished except that this Court could perhaps misinterpret or misapply the law of Utah, and in this particular instance defeat respondent's rights.

An examination of the petition for the Writ of Certiorari and Brief in support thereof conclusively establishes that petitioner, having been defeated by the trial court and by the Circuit Court of Appeals, now asks this Court to afford it another hearing. This Court has on numerous occasions declared that it will not undertake to review questions of

evidence, negligence and errors of law arising during the trial.

General Talking Picture Corporation v. Western Electric Company, 304 U. S. 175, 82 L. Ed. 1273, 58 Supreme Court 849;

Boehmer v. Pennsylvania R. R. Company, 252 U. S. 496;

Chicago Junction R. R. Company v. King, 222 U. S. 222, 56 L. Ed. 173;

Ruhlin v. New York Life Insurance Company, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290;

Southern Power Co. v. North Carolina Public Service Company, 263 U. S. 508, 68 L. Ed. 413;

United States of America v. Johnston, 268 U. S. 220, 69 L. Ed. 925.

CONCLUSION.

Respondent respectfully submits that petitioner has presented no case calling for the exercise by this Court of supervisory powers. Its principal contention is that as a charitable institution, with an expenditure by the Mormon Church of approximately $6,000,000.00 in its construction and maintenance, it should be relieved from a judgment of $3500.00 on account of the loss of an eye suffered by an eighteen year old girl. Respondent fails to appreciate why a rule of non-liability based upon a claim of charitable character should be applied in the absence of unquestionable sustaining state authority. A decision by this Court would have no supervisory or general public effect other than perhaps to put a premium on negligence. Respondent respectfully submits that the petition should be denied.

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